IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

HON. CHRISTOPHER BROWNING, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

FULLER WAYNE SMITH,
Real Party in Interest.

No. 2 CA-SA 2013-0085
Filed December 6, 2013

Special Action Proceeding from the Superior Court in Pima County
No. CR20122219001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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Counsel for Petitioner

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and

Richard L. Lougee, Tucson
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DECISION ORDER

Judge Eckerstrom authored the decision order of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 In this special action, petitioner State of Arizona challenges the respondent judge's order that a third trial would "be tried under the same circumstances as the previous two trials" with "no new witnesses" and any new disclosure "limited to matters which might occur after" the date of the court's declaration of a mistrial in the second trial. We accept jurisdiction of this special action, and, for the reasons stated below, we grant relief.

¶2 Smith's first trial ended in a mistrial after a witness for the state made an inappropriate comment. The respondent judge declared a mistrial in the second trial after the jury was unable to reach a verdict. Thereafter, the respondent indicated from the bench that he would not allow either side to "hire new experts, relitigate the case, rediscover the case, [or] start anew." In a minute entry order, the respondent essentially repeated this ruling and rejected the state's subsequent motion for reconsideration of his order.

¶3 We accept jurisdiction of this special action because, as the state correctly asserts, it has no other means of obtaining review of the issues it raises, because the state has no right to a direct appeal following a trial. *See State v. Leonardo*, 226 Ariz. 593, ¶ 4, 250 P.3d 1222, 1223 (App. 2011); *see also* A.R.S. § 13-4032 (setting forth limited types of orders from which state may appeal directly in criminal

proceeding); Ariz. R. Spec. Actions 1(a) (special action review proper when petitioner has no equally plain, speedy, and adequate remedy by appeal).

¶4 In its petition for special action to this court, as below, the state relies on our supreme court's decision in *State v. Moody*, 208 Ariz. 424, ¶¶ 24-27, 94 P.3d 1119, 1133-34 (2004), in which our supreme court rejected a claim that the state should be precluded from using new evidence in a trial after remand from appeal. In his order denying the state's motion for reconsideration of his ruling, the respondent judge rejected the state's reliance on *Moody*, distinguishing it on the basis that Smith's new trial would take place after a mistrial rather than after a remand.

¶5 But neither Smith nor the respondent judge has cited relevant authority to support such a distinction, and we find none. *Cf. State v. Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 (2000) (defendant who receives relief on appeal on grounds of prosecutorial misconduct equally entitled to be free from second prosecution as defendant who is granted mistrial at trial level). Contrary to Smith's suggestion, as in a mistrial, jeopardy continues when a case is remanded after appeal. *See Lemke v. Rayes*, 213 Ariz. 232, ¶ 20, 141 P.3d 407, 414-15 (App. 2006). Thus, our supreme court's rule set forth in *Moody* controls, and, unless the new evidence the state ultimately seeks to present raises other concerns by changing the nature of the offense charged, *see State v. Sanders*, 205 Ariz. 208, ¶¶ 31-33, 68 P.3d 434, 442-43 (App. 2003), the state is entitled to attempt to introduce new evidence.

¶6 Once the state seeks to admit its evidence, as the respondent judge correctly noted in his order, he has discretion to rule on the admissibility of such evidence within the bounds of the rules of evidence and criminal procedure. *See State v. Campoy*, 214 Ariz. 132, ¶ 5, 149 P.3d 756, 758 (App. 2006) ("Trial courts have broad discretion in ruling on the admission of evidence."); *State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975) (trial court has discretion to determine appropriate relief for Rule 15 violation). But, a court's discretion in this area is exercised within the criminal rules, *see generally State v. Simon*, 229 Ariz. 60, 270 P.3d 887 (App. 2012), and nothing in them allows a court to pronounce a blanket

prohibition of new evidence in a second trial. Rather, a new trial is controlled by the rules of evidence and criminal procedure, including those governing the relevant time frame for pretrial disclosure.

¶7 In sum, nothing in our decision should be read to impair the respondent judge's discretion within the rules of evidence or procedure to admit or preclude any particular piece of evidence the state may seek to admit. But we conclude the respondent's blanket prohibition of any new evidence in Smith's third trial was error. We therefore accept jurisdiction of this special action and grant relief as provided herein.